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Book Review:  
P Dobner & M Loughlin  
*The Twilight of Constitutionalism?* (OUP 2010)  
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**Abstract**

This working paper is a review of P Dobner & M Loughlin *The Twilight of Constitutionalism?* (OUP 2010).

**Keywords**

Constitutionalism, constitutional theory, constitutionalisation, globalisation, transnationalism, sovereignty, pouvoir constituant, pouvoir constitué, democracy, global administrative law, systems theory, societal constitutionalism

**Book Review: P Dobner & M Loughlin *The Twilight of Constitutionalism?* (OUP 2010)**

**Cormac Mac Amhlaigh, University of Edinburgh.**

Transnationalism and globalisation, broadly understood as the proliferation of juris-generative sites beyond the state and the state's diminishing purchase on societal activity including trans-border flows of capital, goods, information and people, is a pervasive theme in contemporary politics. *The Twilight of Constitutionalism?*, the first in a new Constitutional Theory series by OUP, approaches this theme from the viewpoint of constitutionalism, one of the hallmarks of modern sovereign statehood. In the constitutional register, globalisation and transnationalism raise questions about the legitimacy of government and public power as well as the production, nature and function of law in society. The central concern of this volume is whether constitutionalism is something which is intractably embedded in the historically fixed form of the sovereign state and therefore shares its fate in a globalised and transnationalised world, or whether it can migrate from its statist origins and potentially have a new career in the contemporary world, legitimising the functions of non-state entities exercising public or administrative power; in sum, do the twin forces of transnationalism and globalisation constitute the death of the constitutional ideal or its salvation?

The answer to this question will, of course, depend on how the contested concept of constitutionalism is itself defined. That constitutionalism is open to an array of meanings and interpretations is evident in the sixteen individual contributions, virtually all of which spend some time staking out a meaning of constitutionalism (with the slightly unfortunate result that the book can seem somewhat repetitive as many of the chapters cover the same or similar ground regarding the history of the development of constitutionalism in the state context).

There are a number of ways to cut the conceptual cake of constitutionalism, and as Walker contends in his contribution, a certain degree of abstraction is necessary in doing so (296). However, this task encounters a particular Procrustean dilemma; abstract too much in defining constitutional ideals and you end up with a thin, desiccated version of constitutionalism which retains limited analytical purchase, abstract too little, and constitutionalism becomes a parochial, predominantly European construction centring on the culturally, almost ethnically, homogenous nation state which is so specific as to make questions regarding its demise irrelevant and its exportation to non-state settings imperialistic.

For Grimm, Preuss and Loughlin, state constitutionalism entails a very specific form of political and legal practice which is historically fixed and had its hey-day from the post-

revolutionary late eighteenth century to the pre-war twentieth. For these authors, the question posed by the title to this collection is a resounding yes, given that the demise of the state *ipso facto* constitutes the demise of constitutionalism, at least in its original (and best) form. The accent in these contributions is on the constitutive nature of constitutionalism, the *pouvoir constituant* which provides the foundation for political community, a phenomenon which reached its apotheosis in the nation state and has become the standard-bearer of political legitimacy in modernity. None of these, rather elegiac, contributions deny that something resembling constitutionalism has taken on a new shadow-existence in the post-Westphalian era with respect to non-state sites, however, as Loughlin clearly emphasises in his account of constitutionalisation as opposed to constitutionalism, the exportation of constitutionalism beyond the state represents only a part of what was originally a more robust form of constitutionalism, whereby not only government but the nation was constituted in an ancient constitution (52); something which is a chimera outside of the state container.

Practically all the other contributions have fewer compunctions about the ability of the constitutional concept to transcend its statist origins and play a potentially useful and important role in the realities of the increasing fragmentation and dispersal of public power both within and amongst societies. Dobner, Llanque and Brunkhorst, for example, focusing on the relationship between democracy and constitutionalism, do not hesitate to explore the constitutional idea in a globalised setting beyond the state, however none are particularly sanguine about the results. Brunkhorst argues that the normative force of constitutionalism stems from *de facto* recognition and acceptance by the people, highlighting the problems which the lack of such *de facto* acceptance pose for non-state constitutionalism. Both Dobner and Llanque consider the more classic paradigms of constitutional democracy and citizenship, the former arguing that the globalisation of law is fundamentally anathema to the democratic ideals of constitutionalism.

Two sections of the collection deal specifically with particular manifestations of non-state constitutional discourse; the constitutionalisation of the European Union (EU) and International law. Scharpf, Riekman and much more obliquely Borzel, consider the constitutional credentials of the EU. Scharpf in a rich and engaging chapter identifies the political philosophies of liberalism and republicanism as providing the primary normative thrusts of the modern constitutional idea, the latter in particular providing the intellectual foundation of democratic legitimacy in modern constitutionalism. (90-92). Abstracting constitutionalism to the level of a universalising political philosophy obviously clears the

hurdle for its transportation beyond the state setting, and in this vein, Scharpf considers the core questions of political legitimacy which underpins these conceptions in the EU context. However his diagnosis is not encouraging as he finds manifold problems with the workings of the EU from a republican perspective, which are not compensated for by the liberal economic rights and strong judicial review which form the core of EU constitutional discourse. (111-117) Similarly, Riekmann considers the institutionalisation of democratic legitimacy in the EU context by looking at the role of national parliaments in EU decision-making, portraying a mixed picture even after the advances in national parliamentary input introduced by the Lisbon Treaty reforms.

The challenges of constitutionalism at the international level are taken up by Kumm and Wahl, one more sceptical, the other less so with regard to the potential career of constitutionalism in respect of the international legal regime. Kumm, in burnishing the credentials of non-state constitutionalism, particularly in the sphere of international law, rejects the view that constitutional authority is based on supposed legitimate origins by a *pouvoir constituant*. For Kumm constitutions are made, not begotten, and their legitimacy necessarily relies on factors other than pudendous origins even in the state context; to wit the normative principles immanent in modern constitutional practice which can easily be replicated in political and legal practices beyond the state. Wahl takes up Kumm's gambit by providing an analysis of the potential foundations of a putative international law constitutionalism such as international fundamental rights protection and *ius cogens* norms (226-229). However, emphasising the *longue durée* of state constitutionalism, he argues that proclaiming a fully-fledged international legal constitutionalism would be premature.

For those who heed Wahl's counsel about rushing to embrace a global constitutionalism, then Krisch and Somek's alternative regime of Global Administrative Law (GAL) might provide a more palatable antidote to anxieties about the lack of control of the fragmented power resulting from globalisation and transnationalism. Krisch argues that GAL can be seen as a support rather than a threat to democracy and self-government at the national level by ensuring the restraint and accountability of non-state actors, and perhaps more importantly, by providing a more modest alternative to global constitutionalism. A lingering sense of self-doubt surround attempts to differentiate GAL as an autonomous field from more mainstream non-state constitutional discourses, and this becomes clear in Krisch's contribution. In attempting to distinguish GAL from global constitutionalism, even in its most desiccated form, there is a sense in which it never quite manages to shake off its

shadow. For Krisch, with a nod to Loughlin, global constitutionalism never quite lives up to its statist billing, (252) however the reasons why even a ‘small c’ constitutionalism, which would come very close to the ideals of the GAL movement, is neither possible nor desirable, is not developed. One gets the sense on reading this chapter that broadly speaking constitutionalism and GAL do not exist on different ‘planes’ as Krisch contends (256), but rather form part of a continuum differentiated by the modesty of ambition of their respective proponents in addressing the problems posed by contemporary realities.

The implications of a genuinely global administrative *law* are explored by Somek in an intriguing, if somewhat convoluted, chapter. For Somek, transnationalism has produced a proliferation of bureaucracy at different levels, which, following Weber, and presaging the societal constitutionalism in the ensuing section of the book, pursue a non-legal administrative rationality. This post-state administration is not backed up by sovereignty given that the various administrative sites have a jurisdictionally bound mandate but it nonetheless constitutes—claims Somek, following Foucault—the expansion of the state ‘the agency busying itself with governing’ (287), rather than its hollowing out or demise. Somek finds no counter-weight to this expansion in GAL, or indeed any legal form and heralds this development as the triumph of the state over law and politics (287), which, it seems, nothing short of a global sovereign could tame.

The final section of the collection, on societal constitutionalism, is perhaps the most confident about the possibilities of non-state constitutionalism. The anxieties of unchecked and illegitimate power animate Walker’s chapter which provides the most concrete and at the same time necessarily abstract, definition of the concept of constitutionalism (296). There is a sense of urgency about Walker’s contribution in arguing for *some* role for constitutionalism in the globalised world, even as a ‘longstop’ or ‘placeholder’ (307) function, if we are not to lose the important contribution constitutionalism makes in providing mechanisms for putting things in common, and indeed, it would seem, to the existence of a public sphere more generally. The abstraction of the concept of constitutionalism perhaps reaches its zenith in Prandini and Teubner’s contributions which draw on systems theory to argue for the realities of societal constitutionalism. Approaching constitutionalism in the abstract register of systems theory makes the concept much more amenable to transportation beyond and indeed beneath the state, where the classic structural coupling of law and politics is replaced with an array of other systemic couplings. On this account, social systems can be structurally coupled in a variety of permutations and combinations rather like LEGO bricks to produce novel

forms of societal constitutionalism. However, Prandini, in his account of the ‘morphogenesis’ or evolution of the constitutional idea, claims that societal constitutionalism is no mere juridification. Rather, it is the particular problems which constitutionalism addresses which distinguish societal constitutionalism from juridification, namely the problem of the polity and the problem of self-governance. (320)

Teubner’s concerns lie with the classic aspect of state constitutionalism, fundamental rights protection, and particularly and how they can be protected against non-state actors who wield considerable economic, financial and now arguably political power. He argues that it is only possible to understand societal constitutionalism, and by implication the protection of fundamental rights in the private sphere, if a series of myths or misunderstandings about globalisation and law are debunked (329). Ultimately, for Teubner, we must dispense with legal forms to protect fundamental rights in the private sphere which can only ever imperfectly capture the factors at play; communication and individual integrity. Fundamental rights protection must occur internally, that is from the viewpoint of one of the conflicting regimes (340), a sobering (and provocative) thought for proponents of robust, law-based enforcement of fundamental rights standards.

On balance then, the answer given by the majority of the contributions to this collection to the question posed by its title is a qualified ‘no’. Even if current trends and institutional arrangements fall (at times egregiously) short of the ideals and normative values of state constitutionalism, the concept still makes sense out of its statist habitat, and can potentially resolve problems caused by the hollowing out of the state in terms of checking and legitimising public power. However, even if the concept still has relevance in contemporary society, this collection provokes the conclusion, to this reviewer at least, that constitutionalism shares the fate of the protagonists of Di Lampedusa’s classic work, *Il Gattopardo*: it will have to change in order for it to stay the same.